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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 552

WILLIAM TERRA AND JOSEPH TERRA,
Appellants,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

IRA H. MORRIS,
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STATEMENT AS TO JURISDICTION

Jurisdictional Statement

Appellants having presented this day their petition for appeal now file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment in question and to exercise such jurisdiction in this case.

The Statutory Provisions Believed to Sustain the Jurisdiction

This appeal is prosecuted from a judgment of the Court of Appeals of the State of New York, which is the highest court in the State of New York in which a decision in the

within matter can be had. There is drawn in question the validity of Section 1897, Subdiv. 1-A of the Penal Code of the State of New York on the ground that on its face and as construed and applied to the appellants it is repugnant to the Fourteenth Amendment to the Constitution of the United States. The decision of the Court of Appeals was in favor of the validity of this section. This court has jurisdiction on appeal to review the final judgment in question by virtue of the express provisions set forth in Title 28, of the United States Code, Section 1257.

The Statute and Procedure Which Are Involved

Section 1897—Subdiv. 1-A reads as follows:

> "A machine-gun is a weapon of any description irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun. A person who possesses or uses such machine-gun is guilty of a felony. The presence of such machine-gun in any room, dwelling, structure or vehicle shall be presumptive evidence of its illegal possession by all the persons occupying the place where such machine-gun is found. This subdivision shall not apply to possession of a machine-gun as authorized by the preceding section. Nor shall it apply to the possession or use of machine-guns in the discharge of their official duties by the state police, the warden, superintendent, headkeeper or deputy of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, sheriffs, policemen, or other peace officers, nor to the possession or use of machine-guns by a person when on duty in the military or naval service of the United States, nor of this State, or in the postal service of the United States nor to the possession by com-

mon carriers while being transported direct to any police department, military or naval organization, or person authorized by this section to possess and use the same."

Punishment

Section 1935 of the Penal Law of the State of New York states the following on Punishment of felonies when not fixed by statute:

> "A person convicted of a crime declared to be a felony, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence is punishable by imprisonment for not more than seven years, or by a fine of not more than one thousand dollars, or by both."

Section 1941 of the Penal Law of New York states the following on punishment for second or third offense of felony:

> "A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offense, as follows:
>
> If the second or third felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term; provided, however, that the minimum sentence imposed hereunder upon such second or third felony offender shall be in no case less than five years; except that

where the maximum punishment for a second or third felony offender hereunder is five years or less, the minimum sentence must be not less than two years.

For purposes of this section, conviction of two or more crimes charged in separate counts of one indictment or information, or in two or more indictments or informations consolidated for trial, shall be deemed to be only one conviction. As amended L. 1920, c. 571, Sec. 2; L. 1926, c. 457, Sec. 1; L. 1936, c. 70, Sec. 1; L. 1936, c. 328, Sec. 6; L. 1942, c. 700, eff. My 8, 1942."

Date of Judgment or Decree Sought to Be Reversed and the Date Upon Which the Application for Appeal Is Presented

The judgment of the Court of Appeals of New York State which is herein sought to be reversed was rendered on December 6, 1951. This application for appeal is presented on the 14th day of December, 1951.

Statement Showing That the Nature of the Case and of the Rulings of the Court Are Such as to Bring the Case Within the Jurisdictional Provision Relied Upon

Appellants were charged with violation of Section 1897, Subdiv. 1-A of the Penal Code of the State of New York by an indictment charging that the defendants, on or about July 19, 1949, at the City of Rochester, County of Monroe, without lawful authority, wrongfully and feloniously possessed a machine gun from which a number of shots or bullets could be rapidly and automatically discharged from a magazine with one continuous pull of the trigger. Appellants were tried before the County Court of Monroe County, New York State, on the 31st day of May, 1950 before the Monroe County Court and a Jury, and upon a jury verdict finding the defendant guilty as charged, and the overruling of a motion to set aside the verdict, on July 3, 1950, the

appellant, William Terra, was sentenced as a second felony offender to Attica Prison for no less than ten years nor more than fourteen years, and the appellant, Joseph Terra, was given a suspended sentence, probation of five years.

Following the granting of a certificate of reasonable doubt on behalf of the appellant, William Terra, by a Justice of the Supreme Court, he was admitted to bail pending disposition of an appeal taken to the Appellate Division, Fourth Department; and pending the decision of the New York State Court of Appeals, following affirmance of the conviction by the Appellate Division, Fourth Department, a certificate of reasonable doubt having been granted, a Justice of the Court of Appeals ordered a continuance of bail for the appellant, William Terra, in the sum of Twenty-Five Thousand Dollars ($25,000.00).

At the close of the People's case, appellants moved to dismiss the indictment on the ground that the People had failed to establish the burden of making out a *prima facie* case and show an establishment of guilt of the appellants under Penal Law, Section 1897, Subdiv. 1-A beyond a reasonable doubt, and on the ground that said section of the Penal Law was violative of the Fourteenth Amendment to the Constitution of the United States, and that because of such unconstitutionality the District Attorney was not entitled to rely upon the presumption contained in said statute. Said motion was denied.

At the end of the entire case following the production of appellants' witnesses and the closing of proofs, appellants' motion to dismiss was renewed; appellants again asserting failure of proof and matters as to the alleged presumption. This motion was also denied. Then, following the verdict of guilty a motion to set aside the verdict against both appellants was made on the ground that Section 1897 Subdiv. 1-A, was unconstitutional and in viola-

tion of the Fourteenth Amendment to the Constitution of the United States. This motion for a new trial and to set aside the verdict was denied.

Pursuant to prescribed appeal procedure appellants appealed from the judgment of the Monroe County Court to the Appellate Division, Fourth Department of the State of New York, and again asserting the invalidity and unconstitutionality of the section on its face. That Court affirmed the judgment rendered in the County Court of the County of Monroe.

Appellants then obtained leave to appeal to the Court of Appeals of the State of New York. That Court is the highest Court in the state in which a decision upon the matter could be had, and again appellants asserted the unconstitutionality of the section on its face and its application to them. The decision of the Court of Appeals was made solely on the basis of the constitutional questions raised.

The judgment of the Court of Appeals was affirmed unanimously in said Court of Appeals, the Court holding not withstanding appellants' contentions as to the invalidity of the statute, that Section 1897, Subdiv. 1-A did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States and that the statute was valid. "Defendants' right to a fair trial continues undiminished, no hardship is imposed, no constitutional right or safeguard impaired. The judgment should be affirmed."

The appellants were deprived of life and liberty without due process of law by reason of the presumption contained in Section 1897, Subdiv. 1-A of the Penal Code of New York State. The validity of this section as construed and applied by the New York State Court of Appeals was upheld by unanimous Court. The opinion indicated that the New York

State Court of Appeals determined that the decision of the United States Supreme Court in *Tot* v. *United States*, 319 U. S. 643 (1943), where the United States Supreme Court held unconstitutional Section 2(f) of the Federal Firearms Act was distinguishable. The New York State Court of Appeals seemed to find authority in prior decisions of this Court for said distinction on the ground of a reasonable connection between the actual possession of a machine gun and its illegal guilty possession on the ground that Section 1897, Subdiv. 1-A of the Penal Code merely called upon the appellants to explain what was termed the highly sinister and suspicious proof that a sub-machine gun was found in a room occupied by them.

It is submitted that a substantial Federal question, or Federal questions are involved when such a statute on its face and as construed and applied by the New York Courts has been held by the New York State Court of Appeals not to be repugnant to the provisions of the due process clause of the Fourteenth Amendment to the United States Constitution.

Facts

On the afternoon of July 19, 1949, police officers went to the premises identified as 253 Lyell Avenue in the City of Rochester and attained entrance into said building, and upon entrance found fifty or sixty pinball machines. That there were pinball machines lined up on the left side and right side of said premises (fol. 42) and that said officers proceeded to search said machines by turning the keys and opening doors thereon and on those machines that did not have keys, by using claw hammers breaking the doors that were locked. After about twenty minutes, an officer broke one of said doors of a machine and upon examination of the interior discovered a sub-machine gun (fol. 45). The sub-machine gun was wrapped in rags and paper. He took this

machine gun out and placed it on the floor. Information as to knowledge of the machine gun was obtained through questioning of Alphonse Dote, an escaped criminal who was apprehended by State Police. The premises at 253 Lyell Avenue are owned by Marguerite Terra. The business tax license, under the name of Rochester Amusement Company, was applied for by Joseph Terra and tax was paid by Joseph Terra. Joseph Terra was a member of the Fire Department and the Police Force prior to the entering into of the pinball machine business of this address. That he took over that business from his brother, William Terra, in December of 1947 or the forepart of 1948 (fol. 909-910), and that *William Terra was not employed by Joseph Terra in any capacity;* and Joseph Terra continued said business until some time in the first part of July 1949 (fol. 914) when he became acquainted with an Alphonse Dote. He saw him for the first time when he came into his shop. Said Alphonse Dote (fol. 915) asked him if he had charge and who was the boss and wanted to know if he had any pinball machines to sell (fol. 917). Joseph Terra said he had, and that they made an agreement that said Dote would take ten of the machines at $25.00 apiece, and would have to help get them in shape. Dote stated he had no money (fol. 918) but he expected his partner to come up from Utica, and that he would pay before he took the machines. There was no hurry on the delivery of the machines, and that Dote would help clean them up and an arrangement was made to meet at 10 o'clock the next morning (f. 920), but Dote told him that his name was Frank Longo or Roungo (f. 921). The next morning Dote came to the store and started to work on the machines, washing them up (fol. 924). The second day he started to sand the rails and legs of the machine (f. 925), and Joseph Terra told him to go to Mike Joseph to get a vibrator machine, which he did. There were two machines

finished on the first day (f. 935) and that there was a master key to the machines over the work bench (ff. 938, 939), kept there at all times. On the fourth day Dote (f. 941) asked for permission to clean up some machines when Joseph Terra was not there and he received a key for the front door to go ahead and do the work evenings if he wanted to. That after giving him the key to the door (f. 943) he did not see him again. Joseph Terra (f. 945) learned that after giving the key to Dote he was in the premises at about 2:45 on a particular morning (f. 947). At no time did Joseph Terra ever see the machine gun, or did he ever have it in his possession at 253 Lyell Avenue, or at his home (f. 948). That he had no knowledge whatsoever that it was in the pinball machine in the premises operated under the Rochester Amusement Company at 253 Lyell Avenue at any time. Joseph Terra had never seen the machine gun clips (f. 949), nor had any knowledge of them (f. 950). He had never seen or had any knowledge of them. He had never seen or had any knowledge of the four bullets (f. 951). Alphonse Dote was seen by Charles Fornataro (ff. 865 and 866) the morning following the 7th or 8th of July at approximately 2:30 in the morning at 253 Lyell Avenue, with a tool in his hand, probably a screwdriver (f. 867), alone.

Propositions and Authorities

Point I

Appellants contend that this Section 1897, Subdiv. 1-A of the Penal Code of the State of New York is repugnant to the Fourteenth Amendment to the Constitution of the United States in that by the mere presence of an innocent person in any room, dwelling, structure or vehicle, he is presumed guilty of possession of a machine gun. This shifts the burden of proving the defendant guilty beyond a reasonable doubt from the People to the defendant, compelling him to

prove himself innocent merely because he was present or was an "occupant" in such room, dwelling, structure or vehicle (*Tot* v. *United States*, (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241).

Point II

It violates the limitation which the due process clause of the Fourteenth Amendment to the Constitution of the United States sets upon the power of the State Legislature to make the proof of one fact evidence on which guilt is predicated, because there is no rational connection between the fact proved and the ultimate fact presumed, and the presumption is violant, and inconsistent with any argument thereon drawn from experience. The fact that defendant has the better means of information standing alone does not justify the creation of such a presumption (*Tot* v. *United States*, (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241). It is mere legislative fiat and may not take the place of fact in the determination of issues involved in life, liberty and property. (*Manley* v. *Georgia*, (1929) 279 U. S. 1, 49 S. Ct. 215, 73 L. ed. 575). That it violates the presumption that a defendant is innocent until proven guilty beyond a reasonable doubt. It violates the presumption that a man is presumed innocent throughout all phases of the trial unless proven guilty beyond a reasonable doubt. It compels an accused to take the stand and to testify against himself in such a way as to violate the fundamental and rudimentary principles of fair play and to cause a criminal case to be tried in an atmosphere inconsistent with fundamental American principles of liberty and justice which are the base of American principles. (*Tot* v. *United States*, (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241).

Cases Believed to Sustain the Jurisdiction

(*Tot* v. *United States*, (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241);

(*Manley* v. *Georgia*, (1929) 279 U. S. 1, 49 S. Ct. 215, 73 L. ed. 575.)

Statement Respecting Opinion

The unanimous opinion of the Court of Appeals of the State of New York was written by Fuld, J., with Loughran, Ch. J., Lewis, Conway, Desmond, Dye and Froessel, J. J. Copy of said opinion hereto annexed as appendix. Reported in 303 NY180, NE2d.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

411-N.Y. Opinion-Vol. 303—180

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*

against

WILLIAM TERRA and JOSEPH TERRA, *Appellants*

Argued October 5, 1951 Decided December 6, 1951

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the fourth judicial department, from a judgment of said court entered March 7, 1951, unanimously affirming a judgment of the Monroe County Court (O'Mara, J.), rendered upon a verdict convicting defendants of wrongful possession of a machine gun in violation of subdivision 1-a of section 1897 of the Penal Law.

Ira H. Morris for appellants.

Clarence J. Henry, District Attorney, for respondent.

FULD, *J.:*

On July 19, 1949, machine gun and ammunition for it were found in a one-room store occupied—or so the jury could have concluded—by defendants and used by them in connection with their business of distributing and servicing pinball machines. They were indicated, accused of illegally possessing a machine gun in violation of subdivision 1-a of section 1897 of the Penal Law. Adjudged guilty after trial, they seek a reversal upon the ground that the jury was permitted, by virtue of the court's charge to rest its verdict upon that clause of subdivision 1-a, which provides that "The presence of such machine-gun in any room, dwelling, structure or vehicle shall be presumptive evidence of its illegal possession by all the persons occupying the place where such machine gun is found." It is urged that the statute, insofar as it creates the presumption is unconstitutional.

The presumption provision, broad in scope, applies not only where, as here, the machine gun is found in a "room," but also where it is discovered in a "dwelling" "structure" or "vehicle". Mindful of the policy that courts decide only those constitutional questions necessary for determination of the case as presented (see, e.g., *Schieffelin* v. *Goldsmith*, 253 N.Y. 243, 250-251; *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 60; *People ex rel. Price* v. *Sheffield Farms Co.*, 225 N.Y. 25; *People* v. *Beakes Dairy Co.*, 222 N.Y. 416, 429), we consider the statute only insofar as it relates to the presumption based upon occupancy of a "room". (*Cf. People* v. *Murphy*, 276 N.Y. 612; *People ex rel. Murphy* v. *Jackson*, 301 N.Y. 540, in which, although constitutionality of the provision here involved was argued, the court found it unnecessary to decide question.)

Presumptions are no innovation in the field of criminal law. For many years legislatures have been enacting statutes providing that proof of certain facts, which in themselves would be insufficient to justify a conviction, are to be presumptive or prima facie evidence of the existence of the principal fact in issue. Such provisions do, it is true, facilitate proof of guilt and the task of the prosecution, but they are not, for that reason, to be condemned. However, the presumptive device provided for may not be employed in such manner as to impair the right to trial by jury, relieve the prosecution of its burden of proving guilt beyond a reasonable doubt or otherwise deny to persons accused of crime, "those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law". (*Bailey v. Alabama*, 219 U. S. 219, 239; see also, *People ex. Cannon*, 139 N. Y. 32, 43.) And, since a defendant is presumed to be innocent until the contrary is proved, due process, it has been said, demands that "a verdict against (him) * * * be preceded by the introduction of some evidence which tends to prove the elements of the crime charged." (*Tot v. United States*, 319 U. S. 463, 473, per Black, J., concurring.)

The validity of a presumption statute, the permissibility of the presumption created, depend, therefore, upon whether, based on life and life's experiences, a rational

connection between the fact proved and the ultimate fact presumed may be said to exist. (See *People v. Pieri*, 269 N. Y. 315, 324; *People v. Cannon, supra*, 139 N. Y. 32, 42 *et seq.*; *Board of Commissioners v. Merchant*, 103 N. Y. 143, 148; *Tot v. United States, supra*, 319 U. S. 463, 467-468; *Morrison v. California*, 291 U. S. 82, 90; *Manley v. Georgia*, 279 U. S. 1, 5-6, 7; *Casey v. United States*, 276 U. S. 413, 418; *McFarland v. American Sugar Co.*, 241 U. S. 79, 86; *Luria v. United States*, 231 U. S. 9, 25; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 82; *Bailey v. Alabama, supra*, 219 U. S. 219, 238.) "* * * the fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact" (*People v. Cannon, supra*, 219 N. Y. 32, 43), "What is proved must be so related to what is inferred * * * as to be at least a warning signal * * * experience must teach that the evidence held to be inculpatory has at least a sinister significance" (*Morrison v. California, supra*, 291 U. S. 82, 90).

Turning to the case before us, there can be no doubt about the "sinister significance" of proof of a machine gun in a room occupied by an accused or about the reasonableness of the connection between its illegal possession and occupancy of the room where it is kept. Persons who occupy a room, who either reside in it or use it in the conduct and operation of a business or other venture—and that is what in its present context the statutory term "occupying" signifies (see Webster's New International Dictionary (2d ed. 1948), p. 1648; *cf. People* v. *Simon*, 66 Cal. App. 2d 860)—normally know what is in it; and, certainly, when the object is as large and uncommon as a machine gun, it is neither unreasonable nor unfair to presume that the room's occupants are aware of its presence. That being so, the legislature may not be considered arbitrary if it acts upon the presumption and erects it into evidence of a possession that is "conscious" and "knowing". (*Cf. People* v. *Leavitt*, 301 N. Y. 113, 116; *People* v. *Wolosky*, 296 N. Y. 236, 239; *People* v. *Persce*, 204 N. Y. 397, 402.)

On the basis of somewhat similar reasoning, the Supreme Court of the United States has upheld the validity of a statute providing that the existence of a liquor still upon "real estate" constitutes prima facie evidence that those "in actual possession" of the land knew of the location of the still and may, on the strength of that presumption, be held guilty of the crime of permitting a still to be operated upon their property. (*See Hawes v. Georgia*, 258 U. S. 1) And this court has recently reaffirmed the constitutionality of section 1898-a of the penal Law, which recites that the "presence in an automobile" of any gun or other designated weapon "shall be presumptive evidence of its illegal possession by all the persons * * * in such automobile at the time such weapon * * * is found". (See *People* v. *Russo*, also decided today, 303 N. Y. ; *People* v. *Gerschinsky*, 281 N. Y. 581.) If such statutes are constitutional—one presuming knowledge of a still from possession of perhaps a large area of land and the other presuming possession of a gun from mere presence in an automobile—then, a fortiori, a provision declaring possession of a gun inferable from occupancy of the room where it is found, is reasonable and valid.

Except for law enforcement officials and the few other groups expressly exempted from the application of subdivision 1-a of section 1897, a machine gun is never permissible equipment or standard stock in trade of any legitimate business or profession, and rarely, if ever, is its possessor either law abiding or engaged upon a lawful task. If, therefore, it is reasonable—and we have shown that it is—to presume possession of a machine gun from evidence that defendants were occuping the room in which it was kept, it follows almost as a matter of course that it is rational further to infer an illegal possession from actual possession of property, and a machine gun is such prop-

erty, "not likely * * * to be found in the possession of innocent parties." (*Adams* v. *New York*, 192 U. S. 585, 599, affg. 176 N. Y. 351, dealing with policy slips; see, also, *People* v. *Cannon*, *supra*, 139 N. Y. 32, dealing with bottles bearing distinctive marks of another; *State* v. *Fitzpatrick*, 141 Wash. 638, *dealing with burglar's tools; People* v. *Scott*, 24 Cal. 2d 774, *dealing with guns* from which identifying marks were removed, *Reid* v. *Parkerson*, 207 Ga. 27, dealing with lottery tickets; *People* v. *Fitzgerald*, 14 Cal. App. 2d 180, certiorari denied, 299 U. S. 593, dealing with high explosives; *Mantell* v. *Jones*, 150 Neb. 785, dealing with vehicles from which identifying numbers were removed; and cf. Penal Law, S. 1898, providing that possession by any person other than a public officer of certain "dangerous or deadly" weapons is "presumptive evidence of carrying, concealing or possessing with intent to use the same in violation of this article", which was deemed constitutional in *People ex rel. Woronoff* v. *Mallon*, 222 N. Y. 456, 467; *People* v. *Persce*, *supra* 204 N. Y. 397; *People* v. *Panitz*, 251 App. Div. 276)

The section 1897 presumption, with which we are concerned is to be contrasted with section 2(f) of the Federal Firearms Act, declared unconstitutional in *Tot v. United States*, 319 U. S. 463). That provision prescribed that the possession of a firearm by any person who has been convicted of a crime of violence or is a fugitive from justice shall be presumptive evidence that the article was received by him in interstate commerce after the effective date of the statute. Absence of a rational basis for such an inference is as patent as is existence of a reasonable connection between actual possession of a machine gun and its illegal, guilty possession.

The statute here challenged visits no oppressive burden upon an accused. It gives him every opportunity to rebut the presumption—for which, as we have seen, there is fair and reasonable basis—merely calling upon him to explain the highly sinister and suspicious proof that a death-dealing

machine gun was found in a room occupied by him. And, even if he offers no explanation, the jury may still refuse to convict. The burden of proof upon the entire case, the duty of establishing guilt beyond a reasonable doubt, remains as ever with the prosecution. Defendant's right to a fair trial continues undiminished; no hardship is imposed, no constitutional right or safeguard impaired.

The judgment should be affirmed.

Loughran, Ch. J., Lewis, Conway, Desmond, Dye and Froessel, JJ., concur.

Judgment affirmed.

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SUPREME COURT OF THE UNITED STATES

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No. 552

WILLIAM TERRA AND JOSEPH TERRA,
Appellants,

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THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL STATEMENT AS TO JURISDICTION

IRA H. MORRIS,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 552

WILLIAM TERRA AND JOSEPH TERRA,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee

SUPPLEMENTAL JURISDICTIONAL STATEMENT

POINT I

Appellants contend that this Section 1897, Subdiv. 1-A of the Penal Code of the State of New York is repugnant to the Fourteenth Amendment to the Constitution of the United States in that by the mere presence of an innocent person in any room, dwelling, structure or vehicle, he is presumed guilty of possession of a machine gun. This shifts the burden of proving the defendant guilty beyond a reasonable doubt from the People to the defendant, compelling him to prove himself innocent merely because he was present or was a "person occuping" such room, dwelling, structure or vehicle. (*Tot* v. *United States* (1943) 319 U.S. 643, 87 L. ed. 1519, 63 S. Ct. 1241).

Point II

The statute violates the limitation which the due process clause of the Fourteenth Amendment to the Constitution of the United States sets upon the power of the State Legislature to make the proof of one fact evidence on which guilt is predicated, because there is no rational connection between the fact proved and the ultimate fact presumed, and the presumption is violant and inconsistent with any argument thereon drawn from experience. The fact that defendant has the better means of information standing alone does not justify the creation of such a presumption. (*Tot* v. *United States* (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241). It is mere legislative fiat and may not take the place of fact in the determination of issues involved in life, liberty and property. (*Manley* v. *Georgia* (1929) 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215). The statute violates the presumption that a defendant is innocent until proven guilty beyond a reasonable doubt—that a man is presumed innocent throughout all phases of the trial unless proven guilty beyond a reasonable doubt. It compels an accused to take the stand and to testify against himself in such a way as to violate the fundamental and rudimentary principles of fair play and to cause a criminal case to be tried in an atmosphere completely inconsistent with fundamental principles "of liberty and justice which are at the base of American civil and political institutions." (*Tot* v. *United States* (1943) 319 U.S. 643, 87 L. ed. 1519, 63 S. Ct. 1241; *Herbert* v. *Louisiana* (1926) 272 U. S. 312, 71 L. Ed. 270, 47 S. Ct. 103, 48 ALR 1102, and numerous later cases to the same effect.) And see *Rochin* v. *California* (decided Jan. 2, 1952) 342 U. S. —, 96 L. ed. (Adv.) p. 154, 72 S. Ct. —.

Point III

The presumption of guilt authorized by the New York Legislature in this statute is designed to destroy the presumption of innocence and to enable the state to convict citizens en masse without evidence, depriving appellants of due process in violation of the Fourteenth Amendment to the Constitution of the United States. The Statute defines a machine-gun as follows:

> "A machine-gun is a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun."

It is inevitable that such a definition would include any automatic pistol "irrespective of size, by whatever name known."

As constitutionality is determined, not alone by what has been done, but what may be done under the statutory provisions, this Court must consider what may be done under the provisions here complained of. Under its provisions of an automatic pistol could be found in a "room" such as a locker room of a gymnasium and all "persons occuping" it would be presumptively guilty of the crime of possession which is a felony. As the presence of any weapon described in any room, dwelling or structure is prima facie evidence of guilt of all the persons present in the room, building, or structure where such weapon is found to be, the design was to punish innocent persons en masse in the hope that the person guilty might be included in such conviction, unless those who are unfortunate innocent persons are prepared to come forward with evidence sufficient to establish the negative: the

statute has relieved the prosecution from the duty of proving the affirmative.

The statute directs two conclusions, the *corpus delicti*, and the responsibility. If one can state naught but his ignorance, he has failed to sustain the burden imposed, and must stand condemned. As this Court said in *Morrison* v. *California* (1934) 291 U. S. 82, at p. 96, 78 L. ed. 664, 673, 54 S. Ct. 281:

> "The statute says in substance that, unless he can and does prove it, he will have failed to discharge his burden, and will therefore be found guilty. Moreover, if he were to profess ignorance, and ignorance were an excuse, the trier of the facts might refuse to credit him. Holmes, J., in *Ah How* v. *United States*, 193 U. S. 65 at p. 76, 48 L. ed. 622, 24 S. Ct. 357. There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion * * * is cast upon the people."

Various unsuccessful attempts have been made by state and city lawmakers, and even Congress, (1) to destroy a citizen's right to insist that his accuser must prove the charge against him, and (2) to render indictment by grand jury, information by a prosecutor, and trial by a jury a sham, in order to relieve the prosecution of the duty of proving a crime has been committed or that particular persons have committed it; these attempts were in utter disregard of the strongest presumption known to the Anglo-American criminal law—that of innocence until guilt has been established beyond a reasonable doubt. Such legislation has been frequently held to be unconstitutional, in cases such as: *Tot* v. *United States* (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241; *United States* v. *Delia*, 131 F. 2d 614; *Bailey* v. *Alabama* (1911) 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145; *Morrison* v. *California*, *supra*; *Manley* v. *Georgia*, (1929) 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215; *McFarland* v.

American Sugar Co. (1916) 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498; *People* v. *Licavoli* (1933) 264 Mich. 643, 250 N. W. 520; *State* v. *LaPointe* (1924) 81 N. H. 227, 123 A. 692, 31 A. L. R. 1212; *Hammond* v. *State* (1908) 78 Ohio St. 15, 84 N. E. 416, 15 L. R. A. N. S. 906, 14 Ann. Cas. 732, 125 Am. St. Rep. 684; *State* v. *Karls* (1881) 13 R. I. 531; *State* v. *Beswick* (1881) 13 R. I. 211; and even the statute here in question was declared to be unconstitutional by District Judge Cooper in United States ex rel. *Murphy* v. *Warden*, 29 F. Supp. 486. He said:

> "If this Court had to decide in the first instance the constitutionality of this penal statute as construed in this case it would unhesitatingly say that the statute violated the 14th Amendment of the Federal Constitution and was a mere legislative fiat which made all persons in the structure, no matter how large, or how many occupants, nor what was the purpose of their presence, nor how lacking they were of any knowledge of the presence of the machine gun, presumptively guilty of a felony for violation of this section of the penal law."

In all the attempts thus far by legislature to destroy the fundamental rights of citizens these has seldom been such an all-embracing departure from the fundamental principles of constitutional law or traditional rights as is contained in section 1897 1-A of the New York Penal Law. Here, in order to prescribe and punish citizens en masse for a suspected delinquency, of which, perhaps, but a part—perhaps none at all—are guilty, the New York Legislature has devised a new and specious mode of justice to the effect that, where guilt cannot be proven by the usual and legal means, it may be "taken for granted"—producing the same consequences as if guilt had been completely established by competent legal proof. The application is not merely to some particular individual where there may be some rational con-

nection between the fact proved and the conclusion directed, but to persons en masse.

The legislation was not designed for, and has no application to, cases where there actually is evidence upon the question of either the existence of the crime or where natural inferences suffice. The object of the statute was to hit cases destitute of such inferences; it was calculated to substitute conjecture for evidence, it directs a conclusion of guilt from such conjectures, and it emphasizes that such conclusion is inevitable. Under this legislation it is no longer the duty of the Court or jury to ascertain whether or not the defendants are guilty. That conclusion is predetermined by the legislative fiat. The cold fact is that all persons charged must stand convicted unless they can prove beyond reasonable doubt they are innocent. The statute throws our historical jurisprudence in reverse. It does all this despite the fundamental principle consistently held by this Court that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *(McFarland v. American Sugar Co., supra; Bailey* v. *Alabama, supra; Manley* v. *Georgia, supra; Morrison* v. *California, supra.)*

In the absence of rebutting evidence from the accused, the court or jury has no option to acquit, because the judgment of either is not taken on the question of guilt, but on the question as to whether or not the citizens have clearly established their innocence. Argument may be advanced in this case that the defendants are at liberty to rebut the presumption. Such a stand would only more forcibly emphasize the fact—that if the defendants do not go forward with proofs—sufficient proofs—the presumption stands, without more, as proof that they are guilty. The jury must be told, and they were told in the instant case, that the evidence manufactured under the legislative fiat is sufficient, that if there is proof that a machine gun was found in the

structure the body of the crime is laid. "The normal assumption is that the jury will follow the statute, and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes." *(Bailey* v. *Alabama, supra.)*

There is nothing ambiguous about the wording of section 1897 1-A of the New York Penal Law here under consideration in so far as it "authorizes the jury to convict." It is very clear. Such a sweeping mandate leaves no room for rejection by the jury. The purpose of the enactment is too plain not to be recognized, and its purpose, manifested by its language, is self-destructive. It does not provide for a mere inference from extrinsic indicatory proof, but provides guilt en masse by their mere presence of all the people in the dwelling or structure where the machine-gun was found, without more. It expressly constitutes presence presumptive evidence of guilt, and translates an innocent act into a guilty one; that is its manifest purpose, and no amount of ingenuity can read out of it the mandate carried by the expressions therein. It changes a substantive constitutional law. Under the guise of a rule of procedure is created a relentless force which takes from accused persons rights traditionally theirs and guaranteed them by the organic laws of the land. The statute undertakes to force an accused to produce evidence which it is impossible for him to obtain, or else have a question of fact decided against him as though it was one of law.

Cases Believed to Sustain the Jurisdiction.

Tot v. *United States* (1943) 319 U. S. 643, 87 L. ed. 1519, 63 S. Ct. 1241. *Manley* v. *Georgia* (1929) 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215. *Bailey* v. *Alabama* (1911) 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145.

Statement Respecting Opinion.

The unanimous opinion of the Court of Appeals of the State of New York was written by Fuld, J., with Loughran, Ch. J., Lewis, Conway, Desmond, Dye and Froessel, J. J. Copy of said opinion is printed as an appendix to the Statement as to Jurisdiction. Reported in 303 N. Y. 180, —— N. E. 2d ——.

Respectfully submitted,

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No. 552. TERRA ET AL. *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Ira H. Morris* for appellants. Reported below: 303 N. Y. 332, 102 N. E. 2d 576.